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# *The Art and Craft of International Environmental Law as Foundation for Constructive Deliberative Democratic Conversations*

Stephanie Tai

How do we, as a society, develop solutions to environmental problems? In tackling this question, we environmental law scholars sometimes come across as bleak or pessimistic. Our chosen field of study, after all, is one characterized by “physical public resources” that are “particularly difficult to manage or regulate collectively”<sup>1</sup> and “pervasively interrelated.”<sup>2</sup> We observe difficulties in tracing back environmental harms to single discrete causes,<sup>3</sup> and remark upon tensions between economic and philosophical valuations of natural resources.<sup>4</sup> And in frustration, we complain about the inactivity and intractability of various institutions such as the U.S. Congress,<sup>5</sup> administrative agencies,<sup>6</sup> and Conferences of the Parties of various international agreements.<sup>7</sup>

1. See, e.g., Todd Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 267 (2010).
2. See *id.* at 268.
3. See, e.g., Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 747 (2000).
4. See, e.g., Ray Rasker, *Wilderness for Its Own Sake or as Economic Asset?*, 25 J. LAND RESOURCES & ENVTL. L. 15, 15 (2005).
5. See, e.g., Carol A. Casazza Herman et al., *Breaking the Logjam: Environmental Reform for the New Congress and Administration*, 17 N.Y.U. ENVTL. L.J. 1, 1-2 (2008); Richard J. Lazarus, *Congressional Descent: The Demise of Deliberative Democracy in Environmental Law*, 94 GEO. L.J. 619 (2006).
6. See, e.g., Christine A. Klein, *The Environmental Deficit: Applying Lessons from the Economic Recession*, 51 ARIZ. L. REV. 651, 664-65 (2009).
7. See, e.g., David Victor, *Enforcing International Law: Implications for an Effective Global Warming Regime*, 10 DUKE ENVTL. L. & POL'Y F. 147, 148 (1999-2000).

The more optimistic among us sometimes place our hopes in enhanced processes of discussion, calling for increased opportunities for public participation and discussion to break through observed institutional congestion.<sup>8</sup> Some of these calls for enhanced discussion<sup>9</sup> draw inspiration from theories of deliberative democracy, a “theory of civic engagement placing public deliberation at the heart of democratic governance.”<sup>10</sup> As one scholar frames it, “[a]ccording to environmental deliberative democrats, individuals are inclined to make more ethical or reasonable judgments when given the opportunity in a public sphere to reflect about the whole environment as a common good.”<sup>11</sup>

Proposals to enhance the deliberativeness of environmental decision-making are quite varied. Some are quite moderate, such as suggestions to add opportunities for public participation at earlier stages of decision-making processes.<sup>12</sup> Others are broader, such as proposals to create for avenues for direct citizen participation in environmental decision-making processes.<sup>13</sup> Finally, others are rather substantive, such as calls to provide substantive citizen authority over agency decision-making.<sup>14</sup>

I admit, many of these proposals resonate with me. I, too, share the hope — well-founded or not<sup>15</sup> — that enhancing opportunities for informed, deliberative discussions about the environment can aid society in developing appropriate legal and policy responses.<sup>16</sup> Moreover, I sympathize with the idea that deliberative conversations can provide benefits

8. See, e.g., Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321 (2010); FRANK FISCHER, CITIZENS, EXPERTS, AND THE ENVIRONMENT: THE POLITICS OF LOCAL KNOWLEDGE, at xii, 147-69 (2000); Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 4 (1998).
9. See, e.g., Michael Ray Harris, *Environmental Deliberative Democracy and the Search For Administrative Legitimacy: A Legal Positivism Approach*, 44 U. MICH. J.L. REFORM 343 (2011); Lazarus, *supra* note 5.
10. Carri Hulet, *A Glossary of Deliberative Democracy Terms*, 12 DISP. RESOL. MAG. 27 (2005-2006).
11. Harris, *supra* note 9, at 364.
12. *Id.* at 366 (citing Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1518 (1992)).
13. *Id.* at 366 (citing John S. Applegate, *Beyond the Usual Suspects: The Use of Citizens Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 921-26 (1998)).
14. *Id.* at 366 (citing Ethan J. Leib, *Towards a Practice of Deliberative Democracy: A Proposal for a Popular Branch*, 33 RUTGERS L.J. 359, 363-65, 408 (2002)).
15. See Dan M. Kahan et al., *The Tragedy of the Risk-Perception Commons: Culture Conflict, Rationality Conflict, and Climate Change* 14 (Cultural Cognition Project, Working Paper No. 89, 2011) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1871503&http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1871503](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871503&http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871503) (describing empirical studies as demonstrating that “[a]s ordinary people learn more science and become more proficient in modes of reasoning characteristic of scientific inquiry, they do not reliably converge on assessments of climate change risks supported by scientific evidence. Instead they more form beliefs that are even more reliably characteristic of persons who hold their particular cultural worldviews.”); see also Michael Binder et al., *Shortcuts To Deliberation? How Cues Reshape the Role of Information in Direct Democracy Voting*, 48 CAL. W. L. REV. 97, 127-28 (2011) (discussing literature that questions whether deliberation processes enhance substantive decisionmaking); Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9 (2006).
16. See Stephanie Tai, *Three Asymmetries of Informed Environmental Decisionmaking*, 78 TEMP. L. REV. 659, 688-92 (2005) (critiquing the limited avenues available for the public to engage in dialogue with agencies in decision-making processes).

independent from achieving more thoughtful environmental protection — for example, “the moral and psychological benefits of authentic participation in democratic practices.”<sup>17</sup>

I do not intend, in this book review, to weigh in normatively on the desirability of deliberative democracy. Instead, this (all-too-lengthy) introduction is meant to draw attention to some of the gaps left in calls for environmental deliberative democracy: that is, what these citizen conversations might look like in particular contexts, and how they could be substantively enhanced.<sup>18</sup> That is, how do we even have these public discussions regarding legal approaches towards addressing environmental problems, assuming that such discussions are desirable?

This question is especially relevant in the context of international environmental problems, where even citizens who are familiar with the physical contexts behind the problems are often less familiar with the relevant legal frameworks. Take two international environmental issues that were raised in this year’s celebration of World Water Day:<sup>19</sup> (1) the importance of addressing the availability of clean water,<sup>20</sup> and (2) the production of food in a sustainable, less wasteful manner.<sup>21</sup>

To have a substantive discussion about how to enhance access to clean water, we need to be able to understand some of the factual underpinnings behind providing access to clean water. We might also want to be able to talk about the range of goals we may have in developing legal regime for creating clean water access international law doctrines that apply to clean water access — do we focus on some baseline quantity of access, or a balancing approach, or an equity approach? And even if we do decide upon our goals, we might want to be aware of the range of legal instruments available to further those goals.<sup>22</sup> We might also need to be able to discuss whether a right to clean water — even if established — would have any effect on actual access, and if so, what sorts of effects that might have.<sup>23</sup>

Other process-based considerations may also factor into our conversations. For example, if we were to focus on producing food in a sustainable manner, we might want to be aware of the range of stakeholders on such issues, ranging from state actors to international institutions (such as the Food and Agricultural Organization<sup>24</sup>) to non-governmental organizations (such as the International Planning Committee for Food Sovereignty<sup>25</sup>) to

17. Geoffrey W.G. Leane, *Deliberative Democracy and the Internet: New Possibilities for Legitimising Law through Public Discourse?*, 23 CAN. J.L. & JURIS. 373, 390 (2010).

18. Cf. Leane, *supra* note 17, at 374 (expressing frustration that a particular environmental network with the potential for deliberative discourse failed to create avenues for communication that was “informed by [] expertise, deliberation or reflection”).

19. See *About World Water Day*, U.N. WATER, <http://www.unwater.org/worldwaterday/about.html> (describing World Water Day as “[a]n international day to celebrate freshwater [that] was recommended at the 1992 United Nations Conference on Environment and Development (UNCED). The United Nations General Assembly responded by designating 22 March 1993 as the first World Water Day.”).

20. See *id.*

21. See *id.*

22. See Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 704-13 (1999).

23. See, e.g., Bruce Pardy, *The Dark Irony of International Water Rights*, 28 PACE ENVTL. L. REV. 907, 909-16 (2011).

24. FOOD & AGRIC. ORG. OF THE U.N., <http://www.fao.org/> last visited July 1, 2012).

25. INT’L PLANNING COMM. FOR FOOD SOVEREIGNTY,

private entities (such as the Grocery Manufacturers Association<sup>26</sup>). We may want to know the ways in which these stakeholders can shape the international legal process, as well as factors that shape when and how agreements can actually be reached. How might, for example, food-related issues get onto any international legal agenda? Why might states get involved in reaching a sustainable food-production related agreement? And what sorts of steps might factor into any process of creating an actual international agreement involving sustainable food production?

Moreover, conversations regarding problem solving in both of these areas may involve asking questions about how any agreement — if reached — might be complied with or enforced. Are compliance and enforcement left to various states for implementation? Should that be accomplished legislatively, or judicially, or both? And what are the factors that influence how and the extent to which states engage in enforcement and compliance? And what sorts of review processes might there be for determining adequate enforcement and compliance?

To even begin such discussions, it may be helpful to have a common language about how international environmental law decisions get made.<sup>27</sup> That is why I am so pleased to be able to review Daniel Bodansky's book, *The Art and Craft of International Environmental Law*.<sup>28</sup> To me, this book can provide some much-needed foundational background for the sorts of deliberative discussions I described earlier. Rather than taking the more traditional environmental casebook approach of organizing the material into physical subject matters, such as air, water, and wildlife,<sup>29</sup> Professor Bodansky organizes his text functionally, explaining the multitude of factors that enter into the development of international environmental law and using cases from the different physical subject matters as illustrations, rather than organizational centers. In doing so, he details the general physical features of international environmental problems,<sup>30</sup> available policy mechanisms for addressing such problems,<sup>31</sup> and state implementation approaches for various international commitments<sup>32</sup> — topics that are often also explored in traditional international environmental texts but organized in a physical subject matter casebook.<sup>33</sup>

<http://www.foodsovereignty.org/Aboutus/WhatIsIPC.aspx> last visited July 1, 2012).

26. GROCERY MFRS. ASS'N, <http://www.gmaonline.org/> last visited July 1, 2012).

27. See Jennifer L. Hochschild, *If Democracies Need Informed Voters, How Can They Thrive While Expanding Enfranchisement?*, 9 ELECTION L.J. 111 (2010) (describing how “[p]olitical scientists concur that a knowledgeable citizenry is necessary for effective and gratifying democratic governance.”); see also Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 78 IOWA L. REV. 1287, 1303-04 (2004) (describing how deliberative democracy theories entail a greater knowledge burden on voters).

28. DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* (2010).

29. See Emily L. Dawson & Lincoln L. Davies, Book Review, *Environmental Law And Policy: Nature, Law, And Society*, 19 STAN. ENVTL. L.J. 469, 469 (2000) (“Traditionally, environmental law casebooks grapple with the dilemma posed to professors by organizing their materials into physical subject matters . . .”).

30. See BODANSKY, *supra* note 28, at 37-56.

31. See *id.* at 57-85.

32. See *id.* at 205-24.

33. See, e.g., EDITH BROWN WEISS ET AL., *INTERNATIONAL ENVIRONMENTAL LAW & POLICY* (2d ed. 2006) (organizing the study of international environmental law in a more physical media-specific

Much of these topics are explored in other general international environmental texts. But Professor Bodansky provides a larger political and practical perspective on the question of the making of international environmental law. For example, in one chapter, he discusses the process of negotiating international environmental agreements.<sup>34</sup> In this chapter, he explores the differences between legal and nonlegal instruments,<sup>35</sup> state and non-state actors,<sup>36</sup> and contractual v. legislative instruments.<sup>37</sup> Such topics are often explored in other international environmental texts,<sup>38</sup> but rarely provided in as functional a manner as this, where he eschews an in-depth focus on individual treaties and cases in order to provide more abstract but generalizable descriptions of how such instruments work.

In some ways, Professor Bodansky is perhaps too modest about his work.<sup>39</sup> In an early chapter, he describes three perspectives on international environmental law: a doctrinal approach, which focuses on day-to-day analysis of international environmental doctrines to determine what the law “is”;<sup>40</sup> a policy approach, which focuses on more normative arguments about what international environmental law “should be;”<sup>41</sup> and an explanatory approach, which focuses on “two topics: first, the emergence (or non-emergence) of international environmental norms, and second, their effectiveness (or ineffectiveness).”<sup>42</sup> In turn, he describes all of these perspectives as being “essential parts of the international environmental lawyer’s toolkit,”<sup>43</sup> suggesting that his coverage of all three approaches is simply an attempt to fill the toolboxes of international environmental lawyers.

But Professor Bodansky’s meta-approach is more than the sum of the three perspectives he describes. While his approach may be modest in the sense that he argues for what he calls a “thirty-percent solution,”<sup>44</sup> whereby international environmental law plays a constructive, but not exclusive role in addressing international environmental problems, he also argues for a procedural approach of “encourag[ing] and enabl[ing] . . . international cooperation.”<sup>45</sup> Such an approach fits squarely into what I would call a “deliberative knowledge-oriented” approach to international environmental law. By avoiding his own normative assessments of the various inputs into international environmental negotiations, but instead on focusing on a general discussion of potential normative pros and cons of various approaches, he supplies readers with the tools to achieve the “sufficient reasoning ability and philosophical knowledge

approach).

34. See BODANSKY, *supra* note 28, at 154-90.

35. See *id.* at 155-57.

36. See *id.* at 157.

37. See *id.* at 157-58.

38. See, e.g., DAVID HUNTER, JAMES SALZMAN, & DURWOOD ZAELEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* (4th ed. 2011).

39. See, e.g., BODANSKY, *supra* note 28, at 16 (describing his book as having a “comparatively modest agenda”).

40. See *id.* at 5.

41. See *id.* at 6-8.

42. *Id.* at 8.

43. *Id.* at 9.

44. *Id.* at 15.

45. *Id.* at 16.

to be able to debate” international environmental issues in the way that “[deliberative democracy] demands.”<sup>46</sup>

Professor Bodansky’s commitment — intentional or not — to what I call a “deliberative-knowledge-oriented” approach is most evident in his two chapters on the reasons why states might implement their international environmental obligations,<sup>47</sup> and how to evaluate the effectiveness of international environmental agreements. For example, in his discussion of how parties to international environmental agreements might actually implement their obligations, Professor Bodansky explains how the particularities of certain international environmental agreements can constrain the availability of tailored mechanisms for addressing particular problems. He illustrates his explanation with contrasting examples of the Fisheries and Agriculture Organization (FAO) Fisheries Compliance Agreement and the London Convention of the Dumping of Wastes at Sea adopted the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.<sup>48</sup> When an agreement provides considerable detail, such as the Fisheries Compliance Agreement, a participating state may be fairly confined in terms of how it addresses particular problems; in contrast, when an agreement provides more standards-based approaches (such as the London Convention’s approach of requiring states to take “appropriate” measures), a participating state has more flexibility in terms of taking into account its own legal and national circumstances.<sup>49</sup> But taken in conjunction with his discussion of the different ways to evaluate the effectiveness of international environmental agreements,<sup>50</sup> we can see that an agreement that provides considerable detail on state implementation may lead to greater compliance — at least under certain metrics — than a more flexible approach by “reducing ambiguity about what an agreement requires” and “make violations more apparent and less costly.”<sup>51</sup>

In providing this sort of interlaced discussion, Professor Bodansky provides the sort of background understandings useful for tackling other international environmental problems. Take the problem of access to clean water. Although there are a number of international legal instruments that implicitly or explicitly support a right to clean water,<sup>52</sup> with the most recent being the UN General Assembly’s passage of a resolution formally recognizing a human right to water and sanitation,<sup>53</sup> the actual content of that right is “difficult to concisely define.”<sup>54</sup> But is a concise definition desirable? And to the extent that definitions are

46. See Somin, *supra* note 27, at 1304; see also AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 57-58 (Harvard Univ. Press 1996).

47. See BODANSKY, *supra* note 28, at 205-51.

48. See *id.* at 211-12.

49. See *id.*

50. See *id.* at 252-66.

51. See *id.* at 264.

52. See George S. McGraw, *Defining and Defending the Right to Water and Its Minimum Core: Legal Construction and the Role of National Jurisprudence*, 8 LOY. U. CHI. INT’L L. REV. 127, 137-154 (2011) (outlining “the right to water” “through the traditional activity of legal construction; the intellectual origin of the right to water in international relations, its legal basis, scope and obligations are all comprehensively treated.”).

53. The Human Right to Water and Sanitation, G.A. Res. 64/L.63, U.N. Doc. A/64/L.63/Rev.1 (July 28, 2010).

54. See McGraw, *supra* note 52, at 137.

desirable, should they include quantifying access, or extending access to include that necessary for subsistence livelihoods or even ecosystems?<sup>55</sup> In order to deliberate on these questions, we would need to understand some of the factors described in *The Art and Craft of International Environmental Law*: that is, the tensions between more detailed formal agreements and tailored implementation and even state consensus on whether to reach an agreement.

Another example of Professor Bodansky's deliberative-knowledge-oriented approach is his discussion of how one might evaluate the effectiveness of international environmental laws, discussing more traditional metrics such as state noncompliance,<sup>56</sup> but also alternative approaches towards evaluating legal effectiveness, such as behavioral effectiveness or problem-solving effectiveness.<sup>57</sup> He also brings nuance into his discussions of legal noncompliance; while he acknowledges that some critics of noncomplying states assert "bad-faith ratification,"<sup>58</sup> he presents other possible interpretations, ranging from states "changing [their] mind[s]" to states viewing a prior agreement as developing in illegitimate ways such that their initial normative commitments are weakened.<sup>59</sup> Moreover, he alludes to the complexity involved with interpreting a state's "mind," as it were,<sup>60</sup> by discussing how different leaders might come to power in particular states and thereby draw in different values.<sup>61</sup> He also provides a more nuanced approach towards analyzing the "intent" behind noncompliance, describing how

To the extent that a violation results, it may represent an act of omission rather than a commission; that is, it may result from insufficient will to comply rather than from an informative intent to renege....The factors that proved sufficient for ratification are too weak to overcome the domestic resistance to implementation.<sup>62</sup>

Again, such background perspectives are useful in tackling international environmental in issues developing areas. Take the problem of sustainable agriculture. In the world of sustainable agriculture, many discussions revolve around the implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture (PGR Treaty) adopted in 2001,<sup>63</sup> described as "the first ever binding multilateral agreement on sustainable agriculture."<sup>64</sup> According to its terms, the PGR Treaty seeks to promote "the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable

55. See *Implementing the Human Right to Water in the West: Conference Report*, 48 WILLAMETTE L. REV. 1, 8-10 (2011).

56. See BODANSKY, *supra* note 28, at 228-31.

57. See *id.* at 255-58.

58. *Id.* at 228.

59. *Id.* at 229.

60. See, e.g., Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent As Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992) (describing the conundrums involved with assessing a state's "intent," given the involvement of multiple actors).

61. BODANSKY, *supra* note 28, at 229.

62. *Id.* at 229-30.

63. International Treaty on Plant Genetic Resources for Food and Agriculture, 2009, <ftp://ftp.fao.org/docrep/fao/011/i0510e/i0510e.pdf> [hereinafter PGR Treaty].

64. See Gregory Rose, *International Law of Sustainable Agriculture in the 21st Century: The International Treaty on Plant Genetic Resources for Food and Agriculture*, 15 GEO. INT'L ENVTL. L. REV. 583, 583 (2003).



sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.”<sup>65</sup> But what does state noncompliance with the PGR treaty mean? The PGR Treaty, for example, has had four meetings of its Governing Body without reaching agreement on particular compliance mechanisms,<sup>66</sup> even though the terms of the PGR Treaty contemplates the establishment of such mechanisms.<sup>67</sup> What does this lack of agreement suggest about the prevalence of noncompliance with the PGR Treaty? As Professor Bodansky observes, “[t]o the extent that the obligations established by a rule are unclear, it may be difficult or even impossible to identify the required (or prohibited) conduct, and, consequently, to characterize behavior as “compliant” or “non-compliant.”<sup>68</sup> In addition, to evaluate the effectiveness of the PGR Treaty, it may be helpful to examine other metrics for effectiveness, such as the extent to which PGR has promoted changes in state behavior regarding sustainable agriculture (and whether such changes would have happened even were the PGR Treaty not to exist). Such evaluations, in turn, could inform larger conversations about “where to go from here” by providing ways to evaluate existing experiences with international legal agreements addressing sustainable agriculture.

As many reviewers have already observed, *The Art and Craft of International Environmental Law* provides an expansive lens for scholars and practitioners to approach international environmental law, covering not only questions of what international environmental law is, but also how it develops, how it gets implemented, and how its effectiveness can be evaluated.<sup>69</sup> I would argue, though, that it is also an important contribution for strengthening informed democratic discussions about how we as citizens might like to see international environmental law develop, and why.

65. PGR Treaty, *supra* note 63, at art. 1.1.

66. See Nils Goeteyn & Frank Maes, *Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance?*, 10 CHINESE J. INT'L L. 791, 803 (2011).

67. PGR Treaty, *supra* note 63, at art. 21.

68. See BODANSKY, *supra* note 28, at 254.

69. See BODANSKY, *supra* note 28, jacket notes.